If to Association: Allington Towers South Condominium Association, Inc.
1600 S. Ocean Drive
Hollywood, Florida 33021
Attn: Wolf Pakula or Bill Abrahams

or to such other address as any party may designate by writing complying with the terms of this Section. Each such notices shall be deemed delivered (a) on the date delivered if by personal delivery, and (b) three (3) days after the date of mailing, if mailed in the manner specified above.

12. **DISPUTE RESOLUTION AND TERMINATION.**

A. The Association shall be in breach of this Agreement in the event that it fails to pay any charges which it is obligated to pay by the terms of this Agreement within sixty (60) days of the date due. Should Association become forty-five (45) days delinquent, COMPANY shall notify , in writing via facsimile and/or certified mail (return receipt requested), both the Association and its management company of the breach, and provide fifteen (15) days to cure the breach. Association agrees to pay interest at the rate of one percent (1%) per month on all charges which are not paid when due.

B. Without limiting the other rights and remedies which may be available to Association under applicable law, complete failure by COMPANY to provide any CATV Service to any of the Residents for a continuous period of five (5) business days shall constitute a breach of this Agreement, excepting those instances where the cause of the service outage is outside of the control of COMPANY including, but not limited to Acts of God, labor strikes or work stoppages, utility outages or damage by third parties.

C. Failure by COMPANY, at any time during the term of this Agreement, to provide the services, repairs, maintenance, channel line-up or number of channels as set forth in this Agreement, and the continuation of such failure after delivery by Association of thirty (30) days written notice to cure such failure, shall constitute a breach of this Agreement.

D. In the event that either party believes that a breach of this Agreement has occurred or a disputed matter cannot be resolved by the parties, then, the parties may pursue their legal remedies in a court of competent jurisdiction..

13. OWNERSHIP OF EQUIPMENT AND DISPOSITION UPON TERMINATION

All portions of the Central System, with the exception of internal wiring contained within the premises of individual Residential units, beginning at a demarcation point at or about twelve (12) inches outside where the cable wiring enters the individual Residential unit, shall remain the personal property of COMPANY and shall be maintained by COMPANY under the provisions of this Agreement. Upon the expiration or termination of this Agreement, COMPANY shall notify the Association of its intent to remove its property within thirty (30) days of the termination, and complete such removal within sixty (60) days of such notification, or the Property shall be deemed abandoned to the Association. If COMPANY removes any part of the Central System, it shall restore the Property to its original condition. COMPANY's rights hereunder shall be subject to any government regulation concerning cable home wiring that may be then in effect, including 47 C.F.R. section 76.801 et seq.

14. ASSIGNMENT.

This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement may be transferred and/or assigned by COMPANY at any time during the term of this Agreement with the prior written consent of the Association, which consent shall not be unreasonably withheld or delayed. In the event that COMPANY transfers or assigns this Agreement to an entity wholly-owned or controlled by COMPANY or OpTel, Inc., then the prior consent of Association shall not be required. The Association may transfer this Agreement at any time without COMPANY's consent, provided, however, that in the event Association sells, conveys, deed or in any manner transfers Associationship to the Property, Association shall cause the transferee to assume this agreement, this Agreement shall be binding on said transferee and prior to the close of any transfer, Association shall notify COMPANY of the pending transfer. In addition, Association shall notify COMPANY prior to any filing, of a petition in bankruptcy by Association or the commencement of any foreclosure proceedings against the Property.

15. REPRESENTATION AND WARRANTIES.

Association hereby represents and warrants to COMPANY that; (a) this Agreement has been duly authorized, executed and delivered by Association and constitutes the legal, valid and binding obligation of Association enforceable in accordance with its terms; (b) no consent or approval of any other person or entity to the execution, deliver, performance or enforceability of this Agreement is required; © to the best of Association's knowledge, there is no pending or threatened litigation affecting or which might reasonably be expected to affect Association's title to the Property; (d) neither the execution of this Agreement nor the performance of the obligations contained herein by Association will conflict with or result in a breach of the terms, conditions or provision of or constitute a default under any document to which Association is a party; (e) except as previously disclosed to COMPANY, the Association has not entered into any cable contracts or other broadband communications contracts affecting Property (f) upon instruction from COMPANY, Association shall deliver written notice to TCI that is services are terminated and that COMPANY shall be the exclusive provider of the CATV Services.

16. GENERAL TERMS AND CONDITIONS.

The following general terms and conditions shall apply to this Agreement:

A. This instrument contains the entire agreement between the parties and supersedes all prior agreements, understandings and arrangements, oral or written, between the parties hereto with respect to the subject matter hereof. No change or modification of this Agreement shall be valid unless in writing and executed by both parties hereto. If any provision of this Agreement shall be held to be invalid or otherwise unenforceable, such provision shall be stricken and the remainder of the Agreement shall remain unchanged and in full force and effect.

B. Association agrees to provide COMPANY a copy of the official minutes of the Association meeting at which this Agreement is approved and/or ratified. This copy will be provided within thirty (30) days of the meeting.

C. No waiver or modification of any of the provisions of this Agreement shall be valid unless set forth in writing and signed by the party against whom it is sought to be enforced. Any modification not in compliance herewith shall be null and void and of no force or effect.

D. This Agreement shall be governed under the laws of the State of Florida.

E. Association shall not directly or indirectly create, incur, assume or suffer to exist any mortgage, pledge, lien, charge, encumbrance or claim on the Central System.

F. Concurrently with the execution of this Agreement, a Memorandum of this Agreement in the form attached hereto as Exhibit "C" and incorporated herein by reference shall be executed by the parties and subsequently recorded in the county in which the Property is located. Upon termination of this Agreement, COMPANY and Association shall execute and cause to be recorded a release of the Memorandum of Agreement previously recorded.

IN WITNESS WHEREOF the parties have signed this Agreement as of the date first written above.

Allington Towers South Condominium, Inc.

By: _____
Its: _____

TVMAX Telecommunications, Inc.,
a Delaware corporation

By: _____
Its: _____

EXHIBIT "A"

LEGAL DESCRIPTION

FILE COPY

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

COMCAST CABLEVISION OF ARKANSAS, INC. PLAINTIFF

v. 96-5826

GENERAL PROPERTIES, INC.,
FOOTHILLS APARTMENTS LIMITED PARTNERSHIP,
FOOTHILLS ASSOCIATES,
THE CRESTWOOD COMPANY,
FOOTHILLS CORPORATION,
FOOTHILLS II APARTMENTS LIMITED PARTNERSHIP,
FOOTHILLS II ASSOCIATES
APARTMENT HOUSE BUILDERS, INC.
AMERICAN TELECASTING, INC., and
AMERICAN TELECASTING OF LITTLE ROCK, INC. DEFENDANTS

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMCAST'S COMPLAINT

Defendants General Properties, Inc., Foothills Apartments Limited Partnership, Foothills Associates, The Crestwood Company, Foothills Corporation, Foothills II Apartments Limited Partnership, Foothills II Associates (collectively "Foothills"),[1] American Telecasting, Inc., and American Telecasting of Little Rock, Inc. (collectively "American Telecasting") submit this memorandum in support of their motion to dismiss (the "Motion to Dismiss") the complaint (the "Complaint") filed by Comcast Cablevision of Arkansas, Inc. ("Comcast") in the above -referenced action. As shown below, none of the six counts of the Complaint state a claim upon which relief can

[1] Apartment House Builders, Inc., the other defendant herein, is represented by separate counsel in this action. It is our understanding that Comcast may soon voluntarily dismiss this entity from the case.

termination of the 1984 Agreement and disobeyed Foothills' demand that Comcast leave Foothills' Property on August 27, 1996. Instead, on August 23, 1996, with apparently no intention of leaving the Property as ordered by Foothills, Comcast filed its six count Complaint against Foothills and American Telecasting. As of this date, Comcast is still providing its service to the Property. Therefore, Foothills and American Telecasting have been unable to perform as contemplated under the agreement between them, initially executed in February 1996, which provides that American Telecasting shall be the exclusive video services provider on the Property.[1/]

Additional Background

Comcast has been the exclusive provider of video services on Foothills' Property for the last twelve years -- from 1984 through 1996, pursuant to the 1984 Agreement, excepting its current post-termination holdover status. Comcast is now attempting to use that same Agreement -- even though it has been terminated -- to prevent Foothills from ever allowing any other provider to be the exclusive provider on Foothills' Property.

Unlike in 1984, when property owners such as Foothills had no choice but to use the cable operator who is franchised by the local franchising authority (e.g., Comcast), there are now several options from which property owners may choose. Some of those options include medium-sized companies (that are relatively small compared to Comcast) who need to have exclusive access to the properties they serve for some limited period of time in order to ensure that they will recoup their

---

Termination Letter, and Comcast does not and cannot allege to the contrary.

[1/] The current state of affairs at the Property, as well as some of the additional background set forth in the next section below, is provided merely to allow this Court to put the dispute in context. Defendants are not relying upon any facts in requesting that this Court grant the Motion to Dismiss other than those alleged in the Complaint and as reflected in the Exhibits to the Complaint.

investment. One of those companies is American Telecasting, which provides virtually all of the most popular channels at a low price, and which uses microwave in conjunction with cable wire to transmit the signals to its customers. American Telecasting's operations and services are regulated by the Federal Communications Commission. Congress, in enacting the 1996 Telecommunications Act, expressly indicated that it wished to open the telecommunications field to more providers so that competition in the industry could be furthered. H. R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1 (1996).

Comcast, however, wants to thwart companies such as American Telecasting from competing in Arkansas. Comcast seeks to eliminate the competition by claiming that agreements such as the 1984 Agreement - which we understand to be a standard form agreement that exists on numerous properties throughout Arkansas - give Comcast the right to serve such properties in perpetuity. Therefore, if Comcast prevails here, any company that needs exclusive access to serve a property will never be able to serve any property in which Comcast has an agreement like the 1984 Agreement. Moreover, other providers, such as phone companies, may also avoid properties where they cannot get exclusive access for some limited period of time. The bottom line is that if Comcast prevails here, property owners throughout Arkansas may be stuck with Comcast forever regardless of whether they want Comcast or not. Many of these property owners, including Foothills, never even executed video service agreements with Comcast, but instead entered into agreements with predecessors or companies who assigned their rights to Comcast.

Notwithstanding the foregoing, Comcast is asking this Court to hold that property owners such as Foothills cannot terminate Comcast's service, exclude Comcast from the property owners' own property, or select the video service provider of their choice, in the year 2000, the year 2010,

CONCLUSION

In light of the foregoing, this Court should dismiss Comcast's Complaint.

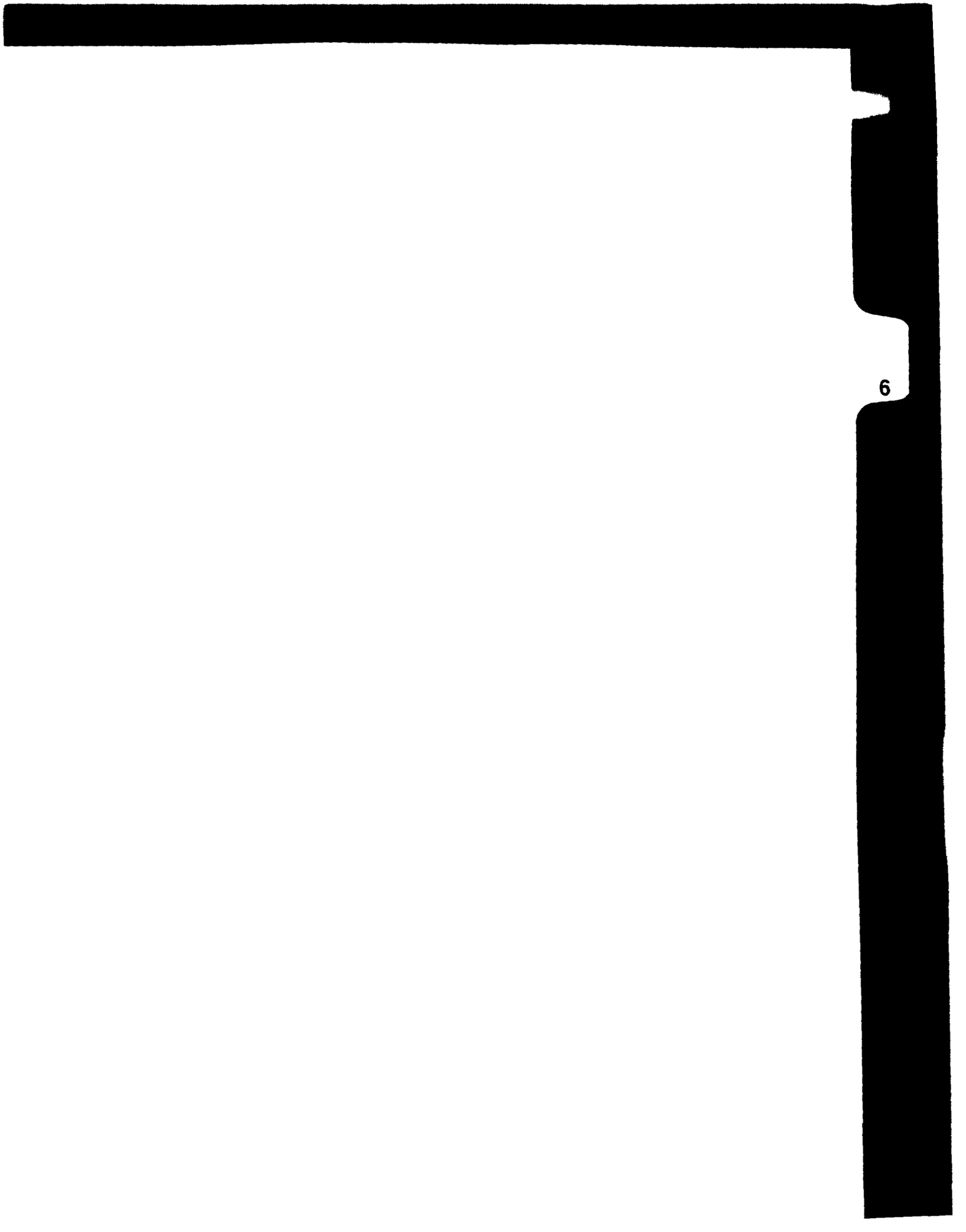
Respectfully submitted,

Deborah C. Costlow
Alan G. Fishel
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005
(202) 371-5700

Timothy W. Grooms, # 84058
Steven W. Quattlebaum, # 84127
WILLIAMS & ANDERSON
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
(501) 372-0800

Counsel for Defendants
GENERAL PROPERTIES, INC.,
FOOTHILLS APARTMENTS LIMITED PARTNERSHIP,
FOOTHILLS ASSOCIATES,
THE CRESTWOOD COMPANY,
FOOTHILLS CORPORATION,
FOOTHILLS II APARTMENTS LIMITED PARTNERSHIP,
FOOTHILLS II ASSOCIATES
AMERICAN TELECASTING, INC., and
AMERICAN TELECASTING OF LITTLE ROCK, INC.

Dated: October 4, 1996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H. A. Langer & Associates
Real Estate Management Company

3767 North Racine Avenue
Chicago, IL 60613
Phone (312) 929-1620
Fax (312) 929-8040

October 31, 1996

Chicago Cable Co.
5711 S. Western Ave.
Chicago, IL 60636-1028

RE : Service at 849-863 W. Buena, Chicago, IL 60613

Effective November 30, 1996, We will no longer use your cable service for the above property. We have secured another video provider for this building beginning December 1, 1996.

On November 30, we expect you to remove all your equipment from this building. All wire & cabling belongs to the building, and must be left intact.

If you have any questions, please call me.

Sincerely,

Robert J. Walter
H. A. Langer & Associates

Chestnut Run Mo. Harriett D. Harwell
444 N. Clay Ave #2P
63122

LINDBERGH PROPERTIES

- DEVELOPMENT
- MANAGEMENT
- SALES

(314) 822-4510
FAX 965-3638

To the Residents of Chestnut Run Condominiums:

Lindbergh Properties is please to announce that we have agreed to change the cable company for Chestnut Run Condominiums.

The Management has signed an exclusive contract with People's Choice TV of St. Louis, Inc. We will no longer have Charter Communications as our cable provider effective December 10, 1995.

Lindbergh Properties is confident that you, as a resident, will be happy with this change and supportive of our efforts to achieve a smooth transition from Charter Communications cable to People's Choice TV.

Thank you!

Lindbergh Properties

425 A South Geyer Road • Kirkwood, Missouri 63122

ENTERED

N Dooley
- Charlottesville
- CQC
- Federal Court
- ORDERS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

MULTI-CHANNEL TV CABLE CO.,	)	CIVIL ACTION NO. 93-0073-C
Plaintiff	)	
v.	)	ORDER OF INJUNCTION
CHARLOTTESVILLE QUALITY CABLE	)	By: B. WAUGH CRIGLER
OPERATING CO., ET AL.,		U. S. MAGISTRATE JUDGE
Defendants	)	

For the reasons set forth from the bench on December 13, 1993 as well as for the reasons set forth in the supplemental findings and conclusions filed immediately prior hereto, it is

ORDERED

that pending the outcome of this litigation, and upon the provision of appropriate security in the amount of $20,000.00, cash or surety,[1] the defendants, as well as their officers, agents, servants, employees and anyone acting in concert or participation with any or all them, hereby shall be enjoined as follows:

[1]The parties agreed that between December 13, 1993 and the entry of this Order, steps would be taken to begin implementation hereof. It also was understood that should defendants believe the bond fixed by the court becomes inadequate to secure costs and damages to the defendant, CQC, in relation to other multiple dwelling subscribers, it could move the court to adjust the bond upwardly, to which motion plaintiff would be given an opportunity to respond.

12/13/93

1) The landowner/management/landlord defendants forthwith shall provide to the plaintiff a list of all tenants residing in the subject properties, together with their addresses and telephone numbers, whose leases have not expired as of the December 13, 1993.[2] The list shall indicate the expiration date of each lease. Plaintiff, by and through its authorized agents, servants and employees hereby shall be permitted to contact each tenant whose lease has not expired to ascertain whether the tenant wishes reconnected service with the plaintiff on whatever basis plaintiff wishes to offer reconnection. The landowner/management/landlord defendants shall refrain from communicating to its tenants any preferences of cable providers, but nothing herein shall prohibit the landowner/management/landlord defendants from communicating with its tenants regarding amendments that may occur in future renewal or new leases as those amendments may relate the choice of cable providers.

2) The landowner/management/landlord defendants shall permit plaintiff access to all buildings for purposes of reconnecting any tenant(s) who wish to return to the plaintiff's service. Plaintiff shall have the right to disconnect CQC's service to any such tenant(s) and, at its own expense, reinstall its service thereto.

3) CQC shall not be entitled to exclusive access or exclusive cable service and it shall cease and desist from activity soliciting or attempting to solicit or engaging or participating in any activity which has as its goal the granting of exclusive access and/or cable service to tenants residing in any multiple dwelling units, wherever situated, in which a "home run" type system

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[2]The court has elected not to require disclosure of a list of tenants whose leases expired between September 1, 1993 and December 13, 1993 and whose renewed leases do not contain a provision granting to the landlord the right to determine the cable provider. It is the view of the court that this category of customer is finite, and, if plaintiff prevails ultimately, damages related thereto are more susceptible to calculation.

has been installed and in which plaintiff had established a direct relationship with tenants for the provision of and the billing for cable services. Nothing herein shall be construed to prohibit CQC's seeking and acquiring non-exclusive rights of access to any multiple dwelling units to provide non-exclusive cable service to tenants, who are serviced and billed directly by the plaintiff as has been established in this action, provided:

a) that in the event CQC provides non-exclusive services to tenants who elect to discontinue plaintiff's services, CQC shall refrain from utilizing any equipment, wiring or hardware belonging to or claimed to be the property of the plaintiff;[3]

b) that CQC shall cease and desist offering anything of value, directly or indirectly, to all landowners, managers or landlords in connection with obtaining any access to the premises for providing cable services to tenants; and

c) that CQC refrain from engaging in any activity, beyond commercially reasonable methods of advertising and marketing its services and products, that wrongful interfere with or lead, produce or cause others wrongfully to interfere with plaintiff's reasonable business relationships to the extent they were found to exist by the court on December 13, 1993.[4]

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[3]In essence, if CQC were to acquire non-exclusive access hereunder, it would be required to install its own equipment for the provision thereof where the existing equipment either belonged or was claimed to belong to plaintiff.

[4]This order does not restrict CQC's ability to negotiate with the landowners, managers or landlords exclusive provider contracts for premises where: a) plaintiff provides no services; or b) plaintiff now provides services but deals directly with the landowner, manager, or landlord and not with the tenants.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
Magistrate Judge

Dec. 15, 1993
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

MULTI-CHANNEL TV CABLE CO., Plaintiff	) CIVIL ACTION NO. 93-0073-C
v.	) SUPPLEMENTAL FINDINGS OF FACT
CHARLOTTESVILLE QUALITY CABLE OPERATING CO., ET AL., Defendants	) By: B. WAUGH CRIGLER U. S. MAGISTRATE JUDGE

This action has been transferred to this court under authority of 28 U.S.C. § 636(c), and it is before this court on the motion of the plaintiff for a preliminary injunction. Fed. R. Civ. P. 65. On December 13, 1993, after due notice of hearing to the defendants, a hearing was conducted before this court, at the conclusion of which the court announced its findings and conclusions. Those findings and conclusions hereby are adopted and, to the extent set forth below hereby are supplemented.

THE LIKELIHOOD OF SUCCESS:

Plaintiff has produced evidence that clearly demonstrates a violation of the anti-kickback provisions of the Virginia Residential Landlord and Tenant Act. Va. Code § 55-248.13:2. The court is not persuaded that by calling a kick-back a consulting fee, it is rendered anything less than a kick-back. While the court does not believe that any payment to the landlord by a cable provider complies with the spirit of the Act, the amount of the payment to the landlord in the instant case is calculated on a percentage of revenue from subscribers and is not based on the

types or amount of work performed by the landlord as a "consultant." To the extent that there was testimony offered that characterized the fee as a consulting fee, it is rejected by this court. This, alone, would entitle plaintiff to an injunction, even though enjoining the violation might not go as far as plaintiff might desire. Va. Code § 55.248.40. By the same token, the violation proven on this record provides substantial evidence supportive of plaintiff's allegations that defendants engaged in an unlawful business conspiracy under both the common law and the statutes of the Commonwealth and establishes that the defendants conducted themselves in a way that eventually led to tortious interference with plaintiff's reasonable business expectancies. See, *Va. Code* § 18.2-449-500; *Duggin v Adams*, 234 Va. 221 (1987); *Hechler v. General Motors Corp.*, 230 Va. 396 (1987); *Allen Realty Corp v. Holbert*, 227 Va. 441 (1984). When these improper methods of excluding the plaintiff from the apartment complexes are coupled with all the circumstances alleged in the verified complaint, and proved at the hearing, the court finds that plaintiff has demonstrated a likelihood that it will prevail on the merits of a number of its claims, even apart from the issues of access and easement on which the defendants have chosen to primarily focus.

Moreover, there is a substantial question raised by the testimony before the court as to the ownership of the wiring on the inside of the buildings now being used by the defendant, CQC, to carry its signal. The evidence was unchallenged as to all but one of the complexes, that the cable ultimately used to carry the signal to the dwelling units belongs to the plaintiff. In that other complex, the manager could only testify that the cable was installed during construction of the complex by a subcontractor of the owner's general contractor. He could not testify as to who paid for the installation of the wiring. Plaintiff, on the other hand, produced testimonial

and other evidence that it either paid for the installation of wire it supplied or performed the installation of the wiring itself in all the subject buildings. The point here is that plaintiff has produced evidence of conversion, which at this juncture is not substantially rebutted. Because of that, the court can draw the inference that whatever services CQC is delivering to the landowner defendants, it is doing so through the use of plaintiff's wiring. The irony of the events then is made complete, for not only has plaintiff been excluded from the premises, defendants are using plaintiff's own hardware to provide services to plaintiff's former subscribers.

In the main, the likelihood of success on the merits of some of plaintiff's claims has been demonstrated.

IRREPARABLE HARM:

The court finds that where cable service is provided on a non-exclusive basis, as was provided by plaintiff, wrongful termination of that service and replacement of it by a provider who has an exclusive service agreement over a period of five years causes irreparable harm. According to the unrebutted testimony of plaintiff's witnesses, the damages suffered by plaintiff are incapable of calculation, not simply difficult to calculate, because the service to customers varied.[1] While defendants put on no evidence to rebut that of the plaintiff's in this regard, their counsel argued that plaintiff's evidence is insufficient to establish irreparable harm because they believe damages are calculable. The court is of the view, however, that without an injunction,

[1]According to the evidence, plaintiff provides service on an *a la carte* basis. That is to say, the subscriber fees are based on the type of service a subscriber selects from a menu. There is no way of determining what menu services will satisfy the appetite of any particular subscriber whose appetite even may change during the subscription period.

plaintiff's business expectancies not only will have been interrupted wrongfully, the nature of the interruption here prevents plaintiff from assessing the whole loss because it would not necessarily be able to reestablish its business relationship because of CQC's exclusive hold on the premises. It is difficult for the court to imagine how plaintiff would go about calculating the loss. Furthermore, the strength of plaintiff's "probability of success" on the merits of at least some of the claims set forth in the complaint, makes irreparable harm sufficiently "possible" as to satisfy the irreparable harm requirement. *Blackwelder Furn. Co. v. Selig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977).

BALANCING THE HARM:

Of course, the issuance of a decree of injunction will have its effects on the defendants. By the same token, this court does not believe that by restoring plaintiff's reasonable business expectancies while, at the same time, permitting CQC to maintain and service the customers to whom plaintiff has no business expectancy will do anything more than what should have been done had the termination of plaintiff's service occurred in a manner consistent with the law. Therefore, the court believes that harm to the defendants' legitimate activities is minimal.

PUBLIC INTEREST

Plaintiff has made much of the signal leakage evidence in its attempt to show how the public interest would be served by enjoining defendants' in this case. Without minimizing the importance of protecting against signal leakage, that simply is not the public interest the court has in mind as significant in this case.[2]

[2]The evidence is that leakage was found, and it has been stopped, thus obviating, in large measure, the need for injunctive relief on this evidentiary ground.

What is significant to the public of this community is the stabilization of the delivery of cable services so as to strike a balance between vigorous, creative competition and basic concepts of fairness. That balance has not been enhanced by Congress' attempts, first to deregulate, and then to re-regulate, the industry, nor has state statutory law kept pace with the peculiar needs associated with delivery and receipt of these nonessential but greatly desired services. The events that led to this lawsuit demonstrate a disorder in the local cable industry which has produced harm to the public, if not to those involved, and which can be obviated only by entry of an injunction.

SUMMARY

Therefore, the court finds that the likelihood of plaintiff's success on the merits of some of its claims is strong, that absent an injunction, plaintiff is likely to suffer irreparable harm but that harm to the defendants is minimal, and that the public interests will be served by such, the court will enter an injunction as set forth by separate order.

The Clerk of the Court is hereby directed to send a certified copy of this Supplemental Findings of Fact to all counsel of record.

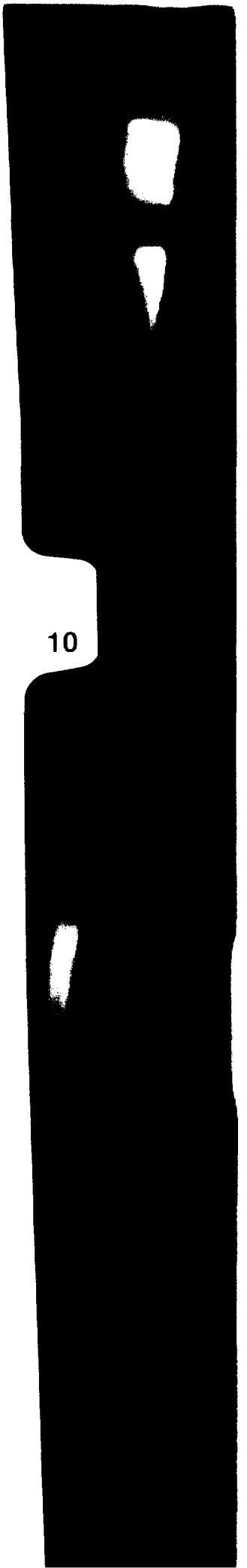
ENTERED:

Magistrate Judge

Dec. 15 1993

Date

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY:
DEPUTY CLERK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facturers will be granted immunity for all manner of improper acts. As explained by ORC, violations of the FDCA and FDA regulations are punishable by significant fines, civil penalties, and imprisonment. Similarly, Gile's assertion that preemption will encourage shoddy clinical investigations and development of defective medical devices lacks merit. As shown by the detailed regulations discussed above, it is unlikely that a non-efficacious or unsafe investigational device would survive FDA review.

Moreover, Gile ignores the countervailing public policy of the discovery and development of new products. *See* 21 U.S.C. § 360j(g) (one purpose of investigational device exemptions is "to maintain optimum freedom for scientific investigators"). As explained by the *Slater* court:

> [I]f experimental procedures are subject to hindsight evaluation by juries, so that failed experiments threaten to impose enormous tort liability on the experimenter, there will be fewer experimental treatments, and patients will suffer.

961 F.2d at 1334. Thus, state tort claims run counter to the important public policy, recognized by Congress, of promoting scientific inventions.

Finally, Gile argues that the district court's grant of summary judgment based on federal preemption encompassed both forum and claim preemption, leaving her without a remedy. She contends that public policy disfavors preemption of common law where no remedies are available to consumers injured by the unreasonable conduct of a manufacturer. However, Congress has the power to displace state tort law remedies, and clearly did so by enacting the MDA. *See e.g., Stamps*, 984 F.2d at 1421 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331, 101 S.Ct. 1124, 1137, 67 L.Ed.2d 258 (1981)). Moreover, Gile is not precluded from asserting a right of redress in the state forum because her claims against her physician are not preempted under the MDA. *See Slater*, 961 F.2d at 1334; *Hunsaker*, 818 F.Supp. at 751. Thus, despite her arguments to the contrary, Gile is not left without a remedy because she may still pursue her claims, if any, against her physician in state court.

V.

There being no genuine issues as to any material facts in this case, the district court committed no error in rendering summary judgment in favor of ORC as a matter of law. Accordingly, the judgment of the district court in favor of Optical Radiation Corporation will be affirmed.

MULTI-CHANNEL TV CABLE COMPANY, d/b/a Adelphia Cable Communications, Plaintiff-Appellee,

v.

CHARLOTTESVILLE QUALITY CABLE OPERATING COMPANY, a Virginia Corporation; Rivanna Partnership, a Virginia general partnership; Alcova Realty & Management Company, Defendants-Appellants,

and

Fountain Court Limited Partnership, a Virginia limited partnership; John A. Schwab, Jr.; Bernard A. Schwab; C. Stuart Raynor, Jr., Intervenors.

No. 94-1082.

United States Court of Appeals, Fourth Circuit.

Argued March 9, 1994.

Decided April 14, 1994.

Cable television provider sought preliminary injunction enjoining competing provider and owners of residential apartment complexes from operating under exclusive cable provider agreements. The United States District Court for the Western District of Virginia, B. Waugh Crigler, United States Magistrate Judge, granted injunction, and